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8 Attorney for Protestants Save the California Delta Alliance, et al.

9 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10 **IN RE CALIFORNIA WATERFIX**
11 **CALIFORNIA DEPARTMENT OF**
12 **WATER RESOURCES AND U.S.**
13 **BUREAU OF RECLAMATION**
14 **PETITION FOR CHANGES IN**
15 **WATER RIGHTS, POINTS OF**
16 **DIVERSION/RE-DIVERSION**

17 **PROTESTANT SAVE THE CALIFORNIA**
18 **DELTA ALLIANCE, ET AL.'s MOTION TO**
19 **ADOPT CROSS EXAMINATION**
20 **PROCEDURE PROHIBITING WITNESSES**
21 **FROM CONSULTING WITH COUNSEL**
22 **DURING CROSS EXAMINATION**

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1 At the July 29, 2016, hearing, Hearing Officer Doduc requested that Save the California
2 Delta Alliance, et al. (“Delta Alliance”) submit, by noon on Monday, August 1, briefing on the
3 procedural question raised by the undersigned at the hearing: that witnesses should be prohibited
4 from consulting with counsel during the witness’s cross-examination. Delta Alliance hereby
5 submits its position on the question.

6 The procedure of prohibiting witnesses from consulting with counsel during cross-
7 examination is intended to ensure the integrity of the cross-examination process. Importantly, the
8 procedure may also be required to preserve the procedural due process right to effective cross-
9 examination guaranteed by the California and United States Constitutions. These WaterFix
10 proceedings present a situation in which due process requires that the procedure be employed to
11 protect the rights of Protestants to effective cross-examination.

12 The procedure is well-accepted in California trial courts:

13 **Witness may be prohibited from consulting with counsel during cross-**
14 **examination:** ... [T]he court may prohibit a witness from communicating with his or
15 her attorney while being cross-examined (i.e. during recesses): On proper
application, the witness can be isolated from opposing counsel until the completion
of the cross-examination.

16 (California Practice Guide Civil Trials and Evidence (Rutter 2016) § 10:177, citations and quotation
17 marks omitted.)

18 Federal courts also commonly apply the rule:

19 It is a common practice for a judge to instruct a witness not to discuss his or her
20 testimony with third parties until the trial is completed. ... cross-examination is more
likely to elicit truthful responses if it goes forward without allowing the witness an
opportunity to consult with third parties, including his lawyer.

21 (*Perry v. Leeke* (1989) 488 U.S. 272, 281–282; *see also* Federal Civil Trials and Evidence (Rutter
22 2016) § 10:299 [“[T]he court may prohibit a witness from communicating with his or her attorney
23 while being cross-examined—i.e., during recess.”])

24 The procedure is required here because the Board has already given Petitioners an advantage
25 by allowing the “panel approach.” Petitioners’ witnesses will be cross-examined in panels. This
26 raises the danger that a witness faltering on cross-examination can throw a “life line” to a fellow
27 panel member, and that person can step in and “rescue” the witness from what would otherwise be
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1 effective cross-examination. Witnesses are supposed to know, and be able to defend, the content of
2 their direct testimony unaided. This is part of the requirement of due process, which “forces the
3 witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of
4 the truth.” (*California v. Green*, (1970) 399 U.S. 149, 158, citation and quotation marks omitted.)¹

5 Applying the procedure here is all the more appropriate because the Board has contingently
6 allowed for redirect examination of witnesses. If the witness has overlooked a point on cross-
7 examination, counsel can elicit that point on redirect. There is no need to coach the witness in the
8 hallway. If the witness knows the subject matter of his or her own knowledge, the point can be
9 effectively elicited on arms-length redirect examination.

10 For the foregoing reasons, Delta Alliance respectfully requests that the Board issue a
11 procedural ruling requiring that, once cross-examination of witness begins, that witness be
12 prohibited from consulting with others, including his or her attorney, about the content of his or her
13 testimony until the cross-examination and, if allowed, redirect examination and re-cross-
14 examination of that witness is concluded.

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16 Respectfully submitted,

Dated: August 1, 2016

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18 Michael A. Brodsky
19 Attorney for Protestants
Save the California Delta Alliance, et al.

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28 ¹ Delta Alliance does not mean to suggest that the Board intended any favoritism to the Petitioners and understands the efficiency considerations of the panel approach. Nevertheless, the danger of misuse remains.

STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL.'s MOTION TO ADOPT CROSS EXAMINATION PROCEDURE PROHIBITING WITNESSES FROM CONSULTING WITH COUNSEL DURING CROSS EXAMINATION

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated July 25, 2016, posted by the State Water Resources Control Board at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on August 1, 2016.


Signature: _____
Name: Michael A. Brodsky
Title: Attorney

Party/Affiliation:
Save the California Delta Alliance, et al.

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